ISSN 1712-4506 (Online)

Ontario Labour Relations Board HIGHLIGHTS

Editors: Voy Stelmaszynski, Solicitor
Leonard Marvy, Solicitor

May 2015

SCOPE NOTES

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in April of this year. These decisions will appear in the March/April issue of the OLRB Reports. The full text of recent OLRB decisions is now available on-line through the Canadian Legal Information Institute www.can[illegible].org.

Certification – Construction Industry – Jurisdictional Dispute – The decision addresses whether labour relations of the employer is subject to federal jurisdiction – The Board noted the work, business or undertaking will fall under federal labour jurisdiction when its "essential operational nature is vital, essential or integral to a federal head of power" and it must determine reach of federal undertaking to make this determination – There was no dispute that cable companies are subject to federal regulation, and that the work of burial employees involves construction work – The employer argued work of burial employees is federally regulated and the Union argued they were provincially regulated – The union distinguished between work performed by burial employees and federally regulated installation technicians – The Board determined whether work of burial employees is severable from the work performed by the installation technicians – Both groups of employees operate under same contractual obligations with the same clients – Union conceded installation technicians are federally regulated – The Board determined there was no basis to find work of burial employees to be severable from the work performed by the installation technicians – Work of burial employees was "vital, essential and integral to the cable companies' business" – Although no corporate relationship existed between employer and cable companies, this factor was not determinative – Board was without jurisdiction to certify the union – Application dismissed

CONNECTALL COMMUNICATION LTD.; RE: Labourers' International Union of North America, Ontario Provincial District Council; OLRB File No. 0361-14-R; Dated April 21, 2015; Panel: Roslyn McGilvery (28 pages)

Health and Safety – In this appeal the applicant asks the Board to rescind the inspector's finding that it had not taken adequate traffic control measures on a project and the stop work order arising from this finding – The Board found no basis to interfere with the inspector's orders: access by workers to the site was unsafe, whether through the "narrow and obstructed pathway which can only be accessed by climbing over a guardrail at a point where the work zone is located near steep decline down a bank to a body of water" or by "stepping out of a blind spot into close proximity of ongoing traffic" – The Board noted that the applicant did not accept as accurate this description of the conditions, however these were the inspector's observations (which were consistent with the photographs) and the applicant lead no direct evidence to the contrary – The Board also found the stop work order to be appropriate (notwithstanding the site had already been shut down as the result of a stop work order against the drilling subcontractor) given that when the order was made no safe traffic control plan had been identified – Finally the Board noted that there was nothing before it to cause it to doubt that the employer made good faith efforts to implement a safe traffic control

plan, however that was not the applicable standard – Section 57 of the Regulation requires that measures to adequately protect the worker are in fact taken – A good faith but nonetheless failing effort to meet this standard still constitutes a contravention of the Act – Appeal dismissed

GOLDER ASSOCIATES LTD.; RE: A Director under the Occupational Health and Safety Act; OLRB File No. 2279-14-HS; Dated April 15, 2015; Panel: Eli A. Gedalof (10 pages)

Certification – *Hospital Labour Disputes Arbitration Act* - Representation Vote – Timeliness - The Health Care and Service Workers Union (CLAC) sought to displace the SEIU – SEIU and Revera agreed their collective agreement would have a term of December 10, 2010 to December 9, 2014, but the parties were unable to conclude the collective agreement – A "no board" report issued May 5, 2011 – CLAC filed its application on November 26, 2014 - SEIU argued the application was untimely because there could be no open period pursuant to section 10(12) of *HLDAA* where there was no collective agreement – The Board determined that the interest arbitration award dated May 8, 2013 settled the parties' collective agreement – The Board will interpret the *HLDAA* provisions so as to ensure there is always an open period during which employees can terminate the union's bargaining rights or choose to be represented by another union – Section 10(11) of the *HLDAA* applies where the parties agree to a term of operation which exceeds two years; in accordance with that section, the term of operation of the collective agreement commenced December 10, 2010 and expired December 9, 2014 – The date on which the collective agreement came into force did not impact its term of operation – The term of operation had been agreed to by the parties and was included in the interest arbitration award pursuant to section 10(3) of the *HDLAA* – A collective agreement and corresponding open period would have been established had the parties complied with the *HLDAA* – In addition to the provisions under *HLDAA*, section 67(1)(b) of the *LRA* dictates that where a union has not made a collective agreement within one year of being certified and 30 days have passed from the issuance of a no board report, the Board will deem an application for certification to be timely – Application is timely

HCN-REVERA LESSEE CENTENNIAL PARK PLACE LP A.K.A. CENTENNIAL PARK PLACE RETIREMENT LIVING; RE: Health Care and Service Workers Union, Local 304 affiliated with the Christian Labour Association of Canada; RE: Service Employees International Union Local 1 Canada; OLRB File No. 2578-14-R; Dated April 2, 2015; Panel: Brian McLean (20 pages)

Health and Safety – Vale sought review of an inspector's order regarding the extent of the examination of the safety catches in the cage conveyance at the Garson Mine – The conveyance, a type of lift or elevator, was used to hoist and lower personnel, equipment and ore (in different compartments) – The inspector ordered the examination to involve the rotation of the safety checks into the timbered walls of the shaft ("chairing the cage") on a daily basis – Vale argued that a daily *visual* examination of the static conveyance was sufficient, and the weekly examination could include the movement of the safety checks – The Board was guided by principles enunciated by the Court of Appeal to read the provisions of the Act and Regulations generously, to achieve a reasonable level of protection for workers in the workplace – In the Board's view, a proper reading of the entire section of the Regulation requires the safety catches to be examined *for any defects* – The unexpected seizing of the "dogs" was a potential defect that could have life-threatening consequences for the workers who ride the conveyance every day – The only way to determine whether the dogs have seized is to conduct a daily examination to see if they will rotate – Appeal dismissed

VALE CANADA LIMITED; RE: USW Local 6500; RE: A Director under the Occupational Health and Safety Act; OLRB File No. 0104-13-HS; Dated April 10, 2015; Panel: Matthew R. Wilson (23 pages)

Bargaining Unit – Strike Replacement Workers – Termination – Voting Constituency – The issue before the Board in this application for a declaration terminating bargaining rights (under subsection 63(2) of the *Act*) was whether employees hired after the strike commenced were eligible to cast ballots and have their votes counted for the purposes of the application – Some striking employees crossed the picket line to return to work and replacement workers were also hired through an agency –WHL hired an additional 103 employees in what it explained was legitimate business expansion – Of these employees, 85 cast ballots that were segregated and sealed – All parties accepted that anyone in the bargaining unit before the commencement of the strike was eligible to vote – It was also agreed that the replacement workers had no entitlement to vote – The union argued that employees hired after the strike commenced were not entitled to vote in the

termination application – WHL submitted that subsections 63(1) and (2) define employees in the bargaining unit for the purposes of a termination application by reference to either the certificate or recognition clause of the collective agreement and that the relevant period to determine the composition of the bargaining unit ought to be the date of the termination application – The union submitted that section 63 of the *Act* is a means for employees to assess the quality of the representation of the union and the newly hired employees had no basis on which to evaluate the union – The Board noted the common language in subsections 63(2) and 63(14) of the *Act* provides that the declaration being sought by the applicants was that the union *no longer represents the employees in the bargaining unit* – The Board held the effect of these two subsections was to limit the bargaining unit for the purposes of the termination application to the employees who have been represented by the union – New hires had never been and were not, at the time of the application, represented by the union – The new employees were not entitled to have their ballots counted – The purpose of a termination application is to evaluate the representational efforts and performance of the union and this evaluative tool would be considerably watered down if employees who have never been represented by the union were entitled to vote – This would be contrary to the purpose of section 63 of the *Act* – Further, the new employees were not part of the collective bargaining process, submitting and voting on proposals for collective bargaining, voting to strike and making the decision to strike when the union called for it – The Board stated the importance of employees being able to launch a meaningful strike caused it to favour a result that maintains the employees' collective ability to choose whether they wish for the trade union to continue to represent their interests during the strike – To allow a group of employees who have never been represented by the union and whose interests are not congruent with the employees in the bargaining unit at the commencement of the strike to vote would fundamentally reduce the effectiveness of the collective action to engage in the strike – Not more than 50% of the ballots cast by employees in the bargaining unit who were eligible to vote were cast in opposition to the union – Application dismissed

WHL MANAGEMENT LIMITED PARTNERSHIP; RE: United Food and Commercial Workers International Union Canada Local 175; RE: Niroshitha Sadyathasan and Frank Brown; OLRB File No. 2882-14-R; Dated April 2, 2015; Panel: Matthew R. Wilson, R. O'Connor and Carol Phillips (26 pages)

COURT PROCEEDINGS

Duty of Fair Representation – Grievance – Judicial Review – Termination – Applicant was terminated for insubordination and alleged time theft and the Union filed a grievance to challenge the termination – Arbitration decision upheld Applicant's termination – Union notified Applicant it would not seek judicial review of the decision – Applicant brought a judicial review application which was dismissed because the Applicant did not have standing –The Applicant filed a claim that the Union had violated its duty of fair representation under section 74 of the *Labour Relations Act* by failing to bring a judicial review of the arbitrator's decision – The Board dismissed the application because the Applicant failed to make out a *prima facie* case that the Union's basis for reaching its decision was "arbitrary, discriminatory or in bad faith" – Divisional Court noted that its role is limited to considering the reasonableness of the Board's decision on the basis of the issues and evidence considered at the time of the hearing – Applicant merely asserted the decision was "wrong" and that he had a "good case" – The Court found the Board's decision was reasonable; it applied the correct legal test; considered the evidence and submissions before it at that time; and its decision was justified, transparent and intelligible and fell within the range of possible acceptable outcomes – Application dismissed

BOGDAN KOSCIK; RE: Ontario Labour Relations Board; RE: Ontario Public Service Employee Union; RE: Lakeridge Health Corporation; Divisional Court File No. DC-14-000634-00; Dated April 15, 2015; Panel: Corbett, Harvison Young and O'Marra JJ. (4 pages)

The decisions listed in this bulletin will be included in the publication Ontario Labour Relations Board Reports. Copies of advance drafts of the OLRB Reports are available for reference at the Ontario Workplace Tribunals Library, 7th Floor, 505 University Avenue, Toronto.

Pending Court Proceedings

Case name & Court File No.	Board File No.	Status
Valoggia Linguistique Divisional Court No.15-2096	3205-13-ES	Pending
Toran Carpentry Inc. Divisional Court No.49/15	0229-13-R	Pending
Sentry Electrical (Canada) ULC Divisional Court No. 041/15	0505-14-R	Pending
Charles Zubovits Divisional Court No. 3/15	1368-04-U	September 29, 2015
Royal Ottawa Hospital Divisional Court No.14-62782 **(Ottawa)**	2461-14-IO	Pending
BACU (BMC Masonry) Divisional Court No.459/14	3236-13-R 0451-14-U	September 17, 2015
College Employer Council Divisional Court No.397/14	1143-14-CV	May 22, 2015
Dean Warren Divisional Court No.345/14	2336-13-U	September 22, 2015
Donald A. Willams Divisional Court No.327/14	1129-13-U	Pending
PCL Constructors Canada Inc. Divisional Court No. 240/14	3414-11-G	Pending
Bogdan Koscik Divisional Court No. DC-14-000636-00JR **(Newmarket)**	0956-13-U	Dismissed
John Harrison Divisional Court No. 189/14	1375-13-U	February 20, 2015 Reserved
Mary McCabe Divisional Court File No.14-2012 **(Ottawa)**	2737-12-U	Pending
LIUNA - Rudyard; Zzen Divisional Court No. 485/13	0318-13-R	April 27, 2015 Heard, Reserved
Godfred Kwaku Hiamey Divisional Court No. 345/13; 346/13	2906-10-U 3568-10-U	May 11, 2015
EllisDon Corporation Court of Appeal No. 36256 (EllisDon seeking leave to SCC)	0784-05-G	Allowed Board Decision restored

(May 2015)